United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,239

CHARLES DANIEL EVERETT,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTION PRESENTED

The question is whether the denial by the District Court of a pre-sentence motion for leave to withdraw a plea of guilty exceeded that court's permissible discretion under the circumstances and constituted error.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,239

CHARLES DANIEL EVERETT,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is a direct appeal from the denial by the District Court of appellant's motion for leave to withdraw his plea of guilty to the charge of assault with intent to commit robbery while armed with a pistol, a violation of Section 22-501, D. C. Code (1961). The motion in question was denied after hearing on June 27, 1963 and a judgment of conviction was entered the same date on the basis of the guilty plea. An application for leave to proceed on appeal without prepayment of costs was filed in the District Court on July 3, 1963. It was denied by the court on July 9, 1963. A petition for leave to appeal in forma pauperis was thereupon submitted to this

Court on August 8, 1963. This petition was granted by order of November 8, 1963.

The District Court had jurisdiction by virtue of Sections 11-305 and 11-306, D. C. Code (1961). The jurisdiction of this Court lies pursuant to Section 1291, 28 U. S. C.

STATEMENT OF THE CASE

An indictment charging appellant with several counts of robbery, assault with intent to commit robbery, assault with intent to commit robbery while armed with a pistol, and carrying a dangerous weapon was filed on February 16, 1963. Appellant was arraigned on these charges on February 25, 1963 and pleaded not guilty to each of the six counts of the indictment.

On April 25, 1963 appellant and his retained counsel came before Judge Schweinhaut for the purpose of entering a plea of guilty to Count III (robbery) and Count IV (assault with intent to commit robbery while armed with a pistol).[1/] Before allowing the change of pleas, the court undertook to comply with the provision of Rule 11, Fed. R. Crim. P., which requires that it "shall not accept the plea [of guilty] without first determining that the plea is made voluntarily with understanding of the nature of the charge." The procedure

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1/ These counts involved two separate incidents, one of which took place on December 13, 1962 and the other on January 4, 1963.

the court followed in doing so was that provided by the Resolution of the Judges of the United States District Court for the District of Columbia, promulgated June 24, 1959. This resolution, which is set forth in the appendix to this brief, requires that the defendant who wishes to enter a plea of guilty be interrogated to the extent necessary to establish ten specific factual points and also requires that the guilty plea be accepted only when the court is satisfied that the defendant is guilty and is entering the plea voluntarily and of his own free will, with an understanding of his rights, the charges against him, and the consequences of entering the plea.

After having the Government's counsel present a summary of the evidence he would be prepared to introduce on these two charges, the court itself questioned the appellant at some length. In the course thereof, the following colloquy took place with respect to Count III (Tr. 6):

Defendant: I admit the charge, Your Honor.

The Court: What happened?

Defendant: I went in and robbed the place.

The Court: Were you by yourself or with someone else?

Defendant: Yes, sir; by myself.

The Court: And did you succeed?

Defendant: Yes, sir.

The Court: How much did you get?

Defendant: About $200.00, sir.

As to Count IV, the exchange was as follows (Tr. 7):

> Defendant: Well, I entered the liquor store and I demanded money, sir; and well, I just remember being shot; that's about all.
>
> The Court: Did you have a gun each time?
>
> Defendant: Yes, sir.
>
> The Court: Did you pull the gun on the people in the store each time?
>
> Defendant: Yes, sir.

The transcript shows that the remaining factual inquiries required by the above-mentioned resolution of June 24, 1959 were made by the court in substantial compliance therewith. The defendant was then permitted to formally plead guilty to each of the two counts. Sentencing was deferred pending the usual probation report.

On May 13, 1963, before sentencing, a formal written motion to change pleas was filed on appellant's behalf. It stated in pertinent part:

> After due consideration and reflection defendant states that he is not guilty of the counts set forth in the indictment, Grand Jury No. 30-63 and particularly with respect to Counts 1, 2, and 3, and therefore, that he have a trial on all alleged charges and have his day in court.

The Government did not file a statement in opposition to this motion.[1/]

1/ Under Rule 9(b) of the General Rules of the District Court, a statement of opposing points and authorities must be filed within five days (or such further time as the court may grant) else the court "may treat the motion as conceded."

This matter came before the District Court for oral hearing on June 27, 1963.1/ The court initially noted that appellant had told the probation officer that he did not commit the crime charged in Count III but admitted the crime charged by Count IV (Tr. 2). The court also stated that it suspected this was because appellant had the idea that since he didn't actually get any money in the case of the attempted robbery "he isn't really going to get any time for having threatened or attempted to hold up the place" (Tr. 3).

After commenting on the fact that the matter had been thoroughly explored at the April 25 hearing, that appellant had there admitted actual guilt as to both counts and that he had since admitted guilt to the fourth (but not the third) count of the indictment to the probation officer and to the psychiatrist, the court asked defense counsel what possible excuse or justification there could be for the relief sought (Tr. 3-5).

In reply, counsel agreed that the court had been extremely thorough on April 25 and "that Your Honor went even further than any other Judge in this court house with respect to protecting this man's rights and having him agree that he

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1/ Three other pending defense motions -- for a psychiatric examination, for discovery and inspection and for release on bond -- were also considered at that time.

was doing that, making the plea, because he was guilty" (Tr. 5). Counsel stated that he was in a "dilemma", that he had "tried to talk to this boy" and to explain to him that he could get just as long a sentence if he had a trial and was found guilty of only the fourth count, but that appellant "insists, I don't know why, that he wants to plead not guilty on all" (Tr. 5-6). Following discussion of the other pending motions, counsel stated again that he was in a "dilemma", but that if the appellant had a defense the court might reset bond "and let him try to go out and get witnesses and work toward a defense if he has any" (Tr. 9-10). No further support for the motion to change pleas was offered.[1/]

The court itself thereupon undertook to directly interrogate appellant; first reading excerpts from the April 25 transcript to him. After reading the above-quoted colloquy with respect to Count III (see page 3, supra), the court asked "What have you got to say about that now?" (Tr. 10). Appellant replied (Tr. 10-11):

> "Well, Your Honor, I pleaded guilty to that charge knowing that I wasn't guilty of it, I guess because I was so confused and worried. I wanted to try to get this over as soon as possible."

Following a further review of the transcript of the earlier hearing, the court ruled that it would not allow appellant to withdraw his plea of guilty (Tr. 11).

1/ It should be noted that although the prosecuting attorney was present throughout the hearing he did not oppose the motion at this or any other time.

Turning to the fourth count, the court asked appellant what he had to say about that charge. This colloquy followed (Tr. 12):

> The Defendant: Well, Your Honor.
>
> The Court: That happened on January 4.
>
> [Defense Counsel]: May I make a statement to this man here?
>
> The Court: Yes
>
> [Defense Counsel]: Charlie, you are before a Judge in the Federal Court, and one of the nicest --
>
> The Court: Don't put any pressure on him.
>
> [Defense Counsel]: I want you to tell that Judge the truth, nothing but the truth.
>
> The Court: Let me just have his statement. What have you got to say about the North Capitol Street place, the thing that happened on the 4th of January?
>
> The Defendant: Well, Your Honor, I am guilty of that charge. I did attempt to rob this place. That's all.

The court thereupon reversed itself and allowed the plea of guilty to Count III to be withdrawn. It denied the motion to withdraw the guilty plea as to Count IV (Tr. 12). No reasons were stated for either action.

Immediately thereafter, appellant was sentenced to a term of nine years under the provisions of the Federal Youth Corrections Act, 18 U.S.C. § 5010(c). The judgment of conviction and order of commitment were entered the same date. This direct appeal of the denial of the motion to change pleas followed.

RULE INVOLVED

Rule 32(d) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., provides as follows:

> (d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit defendant to withdraw his plea.

STATEMENT OF POINT

The denial by the District Court of appellant's pre-sentence motion for leave to withdraw his plea of guilty exceeded that court's permissible discretion under the circumstances and constituted error.

With respect to this point, appellant desires the Court to read the "Motion to Change Pleas" filed on behalf of appellant on May 13, 1963 and the transcript of the oral hearing on this motion held June 27, 1963, pages 1-14.

SUMMARY OF ARGUMENT

It is the established rule in this jurisdiction that leave to withdraw a guilty plea prior to sentencing should be "freely allowed". A motion to change pleas made after sentencing, on the other hand, carries the severe burden of showing that such action is required to correct "manifest injustice".

The District Court may not properly impose the burden of demonstrating some irregularity in the entry of the guilty plea before it grants a pre-sentence motion to change pleas. To do so would, in effect, be to ignore the essential distinction made by Rule 32(d) and by this Court between motions before sentencing and those made after sentence has been imposed. If the fact that the entry of a guilty plea was without demonstrable irregularity can properly be held to be a complete bar to a withdrawal of the plea before sentencing, then the rule and the policy to freely allow such requests would be nullified for most practical purposes.

Nor may the District Court properly explore the question of actual innocence or guilt in considering a pre-sentence motion to withdraw a plea of guilty. The matter of innocence or guilt has been ruled not to be at issue in such a situation. It has similarly been held that withdrawal of a guilty plea should not be denied merely because the defendant might or probably would be found guilty at a trial. Thus no burden whatever can validly be imposed on the defendant in this respect and the inquiry by the court below into this area was improper.

The District Court did not state its reasons for disallowing appellant's request to change pleas, making it somewhat more difficult to test the consistency of its action with the requirement that a change of plea before sentencing be freely allowed. But since this is a direct appeal and not a collateral attack on the court's action, there is no presumption of regularity to be overcome in this regard. The apparent grounds for its denial of the motion were that no defects in the earlier entry of the guilty plea had been shown and that appellant had again stated under interrogation by the court itself that he was guilty. It is submitted that neither of these considerations constitute a valid basis for the denial of the motion since both are inconsistent with a reasonable application of the policy to freely allow the withdrawal of a guilty plea before sentencing.

When, as here, a pre-sentence motion to change pleas is filed shortly after entry of the guilty plea and when no prejudice to the Government's case as a result of the grant thereof is shown, or even alleged, the burden on the defendant should be no greater than to establish that he does in good faith desire to regain the fundamental right to stand trial on the charges against him. The District Court, on the other hand, should deny such requests only when it has some sound affirmative reason for doing so. It had none here.

In the event that this Court is of the view that appellant had some greater burden to meet in supporting his

request, then it must consider the fact that he clearly did not have the benefit of advocacy of his motion by his retained counsel, who merely appeared in the role of an amicus curiae at the hearing on the motion. If he had more of a burden to meet, he also had a right to more effective assistance in meeting it.

ARGUMENT

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S PRE-SENTENCE MOTION FOR LEAVE TO WITHDRAW HIS PLEA OF GUILTY

The subject matter of this appeal touches upon a most fundamental right guaranteed to an accused by the Sixth Amendment -- the right to a trial by jury at which he may confront his accusers and require them to prove him guilty beyond reasonable doubt. Since a plea of guilty has the same effect as an adverse verdict by a jury and is in itself a conviction, Kercheval v. United States, 274 U.S. 220, 224 (1927); Friedman v. United States, 200 F.2d 690, 696 (8th Cir. 1952), the entry of a guilty plea involves a waiver of this basic constitutional right. Appellant's motion below simply sought to regain this right to "have his day in court." The question here then is whether the court below properly held him bound by his earlier waiver. "To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." Glasser v. United States, 315 U. S. 60, 70 (1943).

There is not, of course, an absolute right to withdraw a guilty plea when it has been entered voluntarily and with a full understanding of the charges. Friedman v. United States, supra, 200 F.2d at 696; Williams v. United States, 192 F.2d 39, 40 (5th Cir. 1951); Bergen v. United States, 145 F.2d 181, 186-187 (8th Cir. 1944). But until sentence is actually imposed, a

motion for leave to withdraw the plea of guilty is permitted by the terms of Rule 32(d), Fed. R. Crim. P. After sentencing, on the other hand, this rule authorizes the court to permit the withdrawal of a guilty plea only to correct manifest injustice. This Court has commented with respect to the distinction:

> There is reason in the Rule. Before sentence the court has not acted on the plea of guilty and for any good reason may permit its withdrawal. The imposition of sentence gives finality to the plea of guilty and there is then a judgment of conviction; at that point a motion to withdraw the plea of guilty would be inappropriate because the plea has merged in the judgment. High v. United States, 110 U.S. App. D.C. 25, 288 F. 2d 427, 429 (1961).

Here appellant's motion was made shortly after entry of the guilty plea and long before sentence was to be imposed. Accordingly it was, and is, entitled to be judged solely on the basis of the more lenient standards applicable to pre-sentence motions.

This Court has ruled that "[l]eave to withdraw a guilty plea prior to sentencing should be freely allowed." Poole v. United States, 102 U.S. App. D.C. 71, 75, 250 F.2d 396, 400 (1957) (emphasis added). In doing so it quoted the statement of Supreme Court in the Kercheval decision to the effect that:

> The court in the exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just. (274 U.S. at 224, emphasis added by this Court).

The policy promulgated by the Poole decision was reaffirmed as the rule of this jurisdiction for pre-sentence motions in

Gearhart v. United States, 106 U.S. App. D.C. 270, 272 F.2d 499, 502 (1959). As a consequence, the extent of the permissible discretion of the District Court in dealing with pre-sentence motions to change pleas has been substantially circumscribed in this jurisdiction.[1] It must fully adhere to this Court's liberal interpretation of the provisions of Rule 32(d) as the standard applicable thereto.

The question thus evolves into whether the District Court's action in evaluating and rejecting appellant's pre-sentence motion to change his guilty plea was consistent with the policy of freely allowing such requests. We submit that it was not. From the very first moments of the oral hearing on the motion it was evident that the court considered the appellant to be laboring under a substantial burden in view of what had already transpired (see Tr. 2-4[2]). It was quite plainly annoyed that this attempt to change pleas should be made at all. The court's approach to the whole matter is perhaps best indicated by its somewhat exasperated query: "Now what possible excuse is there to permit him to withdraw the plea of guilty?" (Tr. 4.) Nothing in the record would even suggest that the court considered itself

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1/ It seems clear that this Court, as the highest appellant court for the District of Columbia, has uniquely broad powers with respect to formulation of local rules and policies affecting the administration of criminal justice in the District. Cf. Griffin v. United States, 336 U. S. 704, 713-717 (1949); Fisher v. United States, 328 U. S. 463, 476 (1946).

2/ This and all further transcript references in this brief to the transcript of the June 27, 1963 hearing.

to be under a duty to freely allow the relief requested. Quite the contrary, there is every indication that the court took the opposite view. A fair reading of the record as a whole suggests that it considered itself under no obligation to grant the relief requested unless necessary to correct some demonstrated error of substance in the entry and acceptance of the guilty plea.

The extensive interrogation of appellant with respect to the events of the earlier hearing was clearly designed to demonstrate the propriety and regularity of the court's acceptance of the plea of guilty. There can be little argument that this endeavor succeeded in its purpose. But this is by no means dispositive of the question of whether or not the court's disallowance of the motion was consistent with the policy of freely allowing them. In virtually every case in which the District Court follows the comprehensive requirements of the Resolution set forth in the appendix to this brief (and this, in turn, must be assumed to be virtually every case in which a plea of guilty is entered), there should remain no question as to the regularity of the acceptance of the guilty plea. Does this mean, therefore, that the policy to freely allow changes in pleas before sentencing has been rendered obsolete by the salutary action of the District Court Judges in establishing detailed procedures to insure that the entry of guilty pleas meet the requirements of Rule 11, Fed. R. Crim. P.? The answer must be in the negative, we believe, for the simple reason that a demonstration of

irregularity in the acceptance of the plea of guilty was never intended to be a prerequisite to the grant of pre-sentence motions.

Before sentencing, no action has been taken on the guilty plea. Unless there be some claim of prejudice by the Government (such as, e.g., by reason of the destruction of evidence or the grant of permission for material witness to leave the country on the basis of the entry of the plea), there is little practical difference at that point from the situation prior to acceptance of the plea. There is certainly no question of the defendant merely being dissatisfied with the sentence received. It would seem, therefore, that the policy to freely allow a change of plea at that stage never contemplated that a showing of error in the entry of the plea would be an essential prerequisite. Any requirement that irregularity be demonstrated would surely tend more toward the type of showing required of requests made after sentencing. A question of possible injustice becomes involved whenever errors in the entry of the guilty plea are raised. Consequently, the substantial distinction between pre-sentence and post-sentence motions would improperly be disregarded if such a requirement were imposed. But the Poole and Gearhart decisions make it clear that this distinction must be strictly observed and that none of the substantial burden attaching to the post-sentence motions is to be imposed in the case of a motion made before sentencing.

The interrogation of the appellant by the District Court also had the practical effect of exploring the question of appellant's actual innocence or guilt. Inquiry into this area by the court was improper since it has long been held that an application for leave to withdraw a guilty plea does not involve any issues of the defendant's innocence or guilt. Kercheval v. United States, supra, 274 U.S. at 224; Richardson v. United States, 217 F.2d 696, 699 (8th Cir. 1954); Woodring v. United States, 248 F.2d 166, 169 (8th Cir. 1957). It has similarily been held that withdrawal of the guilty plea should not be denied ". . . merely because the defendant on trial might or probably would be found guilty." Bergen v. United States, 145 F.2d 181, 187 (8th Cir. 1944). It has also been stated by this Court with respect to motions to withdraw a guilty plea before sentencing that ". . . the District Court should not attempt to decide the merits of the proffered defense, thus determining the guilt or innocence of the defendant". Gearhart v. United States, supra, 272 F.2d at 502. It is evident, therefore, that no burden whatever can validly be imposed on a defendant which would require him to demonstrate that there is reason to believe that he is actually innocent of the charges or that he has some meritorious defense to them. To the extent that the District Court sought to elicit such information and to the extent that it relied on the further admission of guilt obtained thereby, its actions were improper and did not give rise to valid basis for the denial of appellant's motion.

Unlike the factual situation in the Poole case, this is a direct appeal from the District Court's denial of the motion for leave to withdraw the guilty plea and is not a collateral attack on the court's action in a proceeding pursuant to 28 U.S.C. § 2255. Accordingly, there is no presumption of regularity to be overcome with respect to the denial on the motion. See Johnson v. Zerbst, 304 U.S. 458, 468 (1938); McNair v. United States, 98 U.S. App. D.C. 359, 235 F.2d 856, 858 (1956).

In the present case, appellant's motion to withdraw his guilty plea was filed shortly after the acceptance of the plea and considerably prior to the date for sentencing. No claim was made that prejudice to the Government's case would result from the withdrawal of the guilty plea. In fact, the Government entered no opposition to the motion, either at the time the written pleading was filed or at the time of the oral hearing thereon. It would appear that the only burden that should be placed on the defendant under such circumstances would be to establish that he does in good faith desire to regain the right to stand trial on the charges against him. No greater burden would be consistent with the policy to freely allow the withdrawal of guilty pleas before sentencing. This burden was certainly met since the record shows that he continued to insist on changing his plea even after his counsel advised against it.

The District Court, on the other hand, should be permitted to deny such requests only when it has some sound affirmative reasons for doing so. As we have seen, it had none here.

To place a burden on the court (or perhaps on the Government if it undertakes to oppose the motion) is analagous to the situation found with respect to petitions for leave to proceed on an appeal without pre-payment of costs. The Supreme Court has ruled that the Government there has the burden of showing that the appeal is so lacking in merit that it does not meet minimal requirements. Coppedge v. United States, 369 U.S. 438, 447-448 (1962). If the court were not required to base its rejection of such motions on sound affirmative reasons, the review by this Court of the consistency of its action with the policy to freely allow changes of plea before sentencing would be substantially hindered. Indeed, absent a specific statement of sound reasons for denying the motion, there would be ample justification for this Court to assume that its liberalized standards had not been followed.

Should this Court be of the view that appellant had some greater burden to meet than to merely establish that he did in good faith desire to stand trial on the charges against him, it must consider the fact that he clearly did not have the benefit of advocacy of his cause at the hearing on the motion. In the Poole case it was deemed of significance to this Court's ultimate decision that counsel appointed to deal with the possible withdrawal of the guilty pleas was directed "to be something less than an advocate", 250 F.2d at 401. Here, a fair reading of the transcript of the hearing will show that appellant's counsel

did not purport to act in the capacity of an advocate insofar as the motion to change pleas was concerned. It is evident that, at best, he appeared in the role of an amicus curiae and made no attempt to urge the grant of appellant's request or to establish any further basis therefor. The accused "requires the guiding hand of counsel at every step in the proceeding against him," Powell v. Alabama, 287 U.S. 45, 69 (1932) (emphasis added), and appellant obviously was at an extreme disadvantage when his own counsel made it clear that he personally did not think it advisable that appellant should attempt to change his plea and that he had tried to talk him out of it (Tr. 5-6). If appellant had more of a burden to meet, he also had a right to more effective assistance in meeting it. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calucations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 76 (1942).

CONCLUSION

For the foregoing reasons, the order of the District Court denying appellant's motion to withdraw his plea of guilty to Count IV of the indictment should be reversed, the judgment of conviction based on this guilty plea set aside, and the case remanded to the District Court with instructions to allow

appellant to enter a plea of not guilty to this charge.

Respectfully submitted,

/s/ Joseph F. Healy, Jr.

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Attorney for Appellant
(Appointed by this Court)

December 24, 1963

APPENDIX

The following Resolution of the Judges of the United States District Court for the District of Columbia was promulgated June 24, 1959:

> RESOLVED, that it is the consensus of opinion of the Judges of this Court that in all cases in which defendant enters a plea of guilty the defendant should be interrogated by or under direction of the Court to establish the following facts:
>
> 1. That defendant has been advised and understands that he has a right to a speedy trial by jury with the aid of counsel, but will have no such right if his plea of guilty is accepted.
>
> 2. That he will have the assistance of counsel at the time of sentence if the plea is accepted.
>
> 3. That defendant understands the nature of the charges against him which should be stated to him in brief by the Court notwithstanding a prior reading of the indictment.
>
> 4. That defendant did in fact commit the particular acts which constitute the elements of the crime or crimes charged.
>
> 5. That the guilty plea has not been induced by any promise or representation by anyone as to what sentence will be imposed by the Court.
>
> 6. That he has not been threatened or coerced by anyone into making the guilty plea.
>
> 7. That no promises of any kind have been made to him to induce the guilty plea.
>
> 8. That he has an understanding of the consequences of entering the plea of guilty.
>
> 9. That he is entering this plea voluntarily and of his own free will because he is guilty and for no other reason.
>
> 10. That he has discussed the entry of his plea of guilty fully with his attorney.

IT IS FURTHER RESOLVED, that it is the consensus of opinion of the Judges of this Court that plea of guilty shall be accepted only when the Court is satisfied that he is guilty and that he is entering the plea voluntarily and of his own free will, and with an understanding of his rights, of the charges against him, and the consequences of entering the plea.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18239

CHARLES DANIEL EVERETT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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FRANK Q. NEBEKER,
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Assistant United States Attorneys.

QUESTION PRESENTED

In the opinion of the appellee, the following question is presented:

Where appellant plead guilty intelligently and voluntarily after being apprised of his right to a jury trial and the possible consequences of his plea, and where he thereafter sought to withdraw the plea before sentence for no other reason than that he wished to put the government to its proof, was he entitled as a matter of right to withdraw his guilty plea and did the District Court err in denying his motion to withdraw it?

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TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18239

CHARLES DANIEL EVERETT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant Everett plead guilty to two counts of a six-count indictment. Before sentence he sought to withdraw his guilty plea. Judge Schweinhaut permitted withdrawal of the plea to one of the counts but not of the plea to the other. He sentenced appellant to 9 years imprisonment under the Federal Youth Corrections Act, 18 U.S.C. 5010(c) (June 27 Tr. 13).

The six-count indictment was filed February 18, 1963. It charged Everett with three robberies and an attempted robbery, all occurring on different dates. 22 D. C. Code §§ 2901, 501. The first count charged that Everett robbed Belle Corman of $1,850 in money on April 12, 1962. The

second count charged that Everett robbed Francis Hunter and Lorraine Weiss of $4,700 in money on June 13, 1962. The third count charged that Everett robbed William Shapiro of $260 in money. The fourth count charged that Everett made an armed assault on Hyman Minkoff and Robert Lindsey with intent to rob them on January 4, 1963. The fifth count charged that Everett assaulted Minkoff and Lindsey with intent to rob them on January 4, 1963. The sixth count charged him with carrying a pistol without a license on that date. 22 D. C. Code § 3204.

On February 25, 1963, Everett was arraigned and entered a plea of not guilty to all six counts. He was admitted to bail (April 25 Tr. 13-14; June 27 Tr. 5-6). On April 25, 1963, Everett, accompanied by retained counsel, withdrew his plea of not guilty and entered a plea of guilty to Count III (robbery) and Count IV (assault with intent to commit robbery). The transcript of the proceedings of April 25 shows that, as to Count III, the following dialogue took place between Everett and the court (Tr. 6):

DEFENDANT: I admit the charge, Your Honor.
THE COURT: What happened?
DEFENDANT: I went in and robbed the place.
THE COURT: Were you by yourself or with someone else?
DEFENDANT: Yes, sir; by myself.
THE COURT: And did you succeed?
DEFENDANT: Yes, sir.
THE COURT: How much did you get?
DEFENDANT: About $200.00, sir.

As to Count IV, the April 25 transcript shows the following (Tr. 7-9):

THE COURT: What about the January 4th case?
THE DEFENDANT: Yes, sir; I committed that, sir.
THE COURT: Tell me what you did.

THE DEFENDANT: Well, I entered the liquor store and I demanded money, sir; and well, I just remember being shot; that's about all.

THE COURT: Did you have a gun each time?

THE DEFENDANT: Yes, sir.

THE COURT: Did you pull the gun on the people in the store each time?

THE DEFENDANT: Yes, sir.

THE COURT: And one of the men in the January 4 case, one of the employees, a man named Lindsey, is the one who shot you?

THE DEFENDANT: Yes, sir.

THE COURT: Did you do any shooting yourself?

THE DEFENDANT: No, sir.

THE COURT: How were you able to get away on that day?

THE DEFENDANT: Well, sir, I went out and caught a cab.

THE COURT: When did you go to Norfolk?

THE DEFENDANT: The following—next morning.

THE COURT: When were you arrested in Norfolk?

THE DEFENDANT: Well, my wounds began to bother me. I went to the hospital for treatment.

THE COURT: The next day, the 5th?

THE DEFENDANT: That was the next day; yes, sir.

THE COURT: When were you arrested—that day?

THE DEFENDANT: That night; yes, sir.

THE COURT: When were you brought back to Washington?

THE DEFENDANT: I was brought back the following Tuesday.

THE COURT: From the hospital?

THE DEFENDANT: From the precinct.

THE COURT: When were you released from the hospital? The "following Tuesday" doesn't mean anything to me, because I don't know what day it was.

THE DEFENDANT: I think it was January 8th.

MR. TITUS: It was the 7th, Your Honor, according to our records, that he was brought back.

MR. SHENOS [Defense Counsel]: May I ask the witness two questions?

THE COURT: Yes.

MR. SHENOS: You are talking about January 4th, and that is the liquor store, the Acme Liquor Store in the 1400 block of North Capitol Street. You had the gun that you told me you purchased out in Arlington for the protection of your home, is that right?

THE DEFENDANT: Yes, sir.

MR. SHENOS: Did you tell me that that gun had the catch on so it wouldn't fire?

THE DEFENDANT: Yes, sir.

MR. SHENOS: Did you ever take the catch off while you were in the process of robbing this store?

THE DEFENDANT: No, sir; I didn't.

MR. SHENOS: Now, Mr. Lindsey is the clerk in the store. He shot you?

THE DEFENDANT: That's correct, sir.

MR. SHENOS: Is what arm did that shooting take place?

THE DEFENDANT: In the right arm.

MR. SHENOS: Is the bullet still in there?

THE DEFENDANT: Yes, Sir.

MR. SHENOS: I felt that bullet the other day, didn't I?

THE DEFENDANT: Yes, sir.

MR. SHENOS: Right underneath the skin. It's still in there.

Everett then was asked if he knew that he was waiving his right to a jury trial and that his guilty plea would be as binding as a jury verdict; he replied affirmatively (Tr. 11). He also replied affirmatively when he was asked if he realized that he could be sentenced to a maximum term of ten to thirty years imprisonment (Tr. 11, 12). Everett stated that he was pleading guilty because he was guilty and for no other reason, and not because the government had agreed to a dismissal of the remaining counts (Tr. 12). He denied that anyone had "put any kind of pressure" on him or made any promises of leniency to him (Tr. 12, 13). Counts III and IV were

then read to him and he pleaded guilty to each count separately.

On May 13, 1963, Everett, by his retained counsel, filed a motion pursuant to Rule 32(d), Fed. R. Cr. P., to withdraw his pleas of guilty before sentencing. The motion read:

> After due consideration and reflection defendant states that he is not guilty of the counts set forth in the indictment, Grand Jury No. 30-63 and particularly with respect to Counts 1, 2, 3, and therefore, that he have a trial on all alleged charges and have his day in court.

The hearing on the motion took place on June 27, 1963. Everett's retained counsel was present. The June 27 transcript shows the following: Everett stated that he pleaded guilty to Count III because he was "confused and worried," and said that he was innocent of the robbery charged therein (Tr. 4). As to Count IV, Everett stated, "Well, Your Honor, I am guilty of that charge. I did attempt to rob this place. That's all" (Tr. 12). No justification for the withdrawal of the plea on Count IV was offered other than Everett's wish, expressed in his written motion to withdraw the pleas, to stand trial rather than plead guilty. The court granted the motion as to Count III, but denied the motion as to Count IV (Tr. 12). As stated, the court sentenced Everett to nine years imprisonment under the Federal Youth Corrections Act (Tr. 13).[1]

RULES INVOLVED

Rule 11 of the Federal Rules of Criminal Procedure provides:

> *Pleas.* A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.*

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[1] Pending action by this Court on Everett's appeal from the District Court's refusal to permit withdrawal of the plea to Count IV, the remaining five counts were not dismissed (Tr. 14).

> The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

Rule 32(d) of the Federal Rules of Criminal Procedure provides:

> *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

SUMMARY OF ARGUMENT

The district court properly denied appellant's motion to set aside his plea of guilty. Appellant plead guilty voluntarily and intelligently, after being fully apprised of his right to a jury trial and the possible consequences of the plea. He was on bail prior to pleading guilty, and was represented by retained counsel. The District Court took the utmost care in examining appellant in accordance with Rule 11, Fed. R. Cr. P., before accepting his plea. Appellant admitted in detail that he committed the crime to which he was pleading guilty. In support of the motion to withdraw the plea appellant offered nothing except his wish to "have his day in court." At the hearing on the motion he reiterated his guilt. He asserted no defense to the charge and made no showing that the plea was in any way involuntary or not intelligently entered. His position in the District Court and on appeal is that he was entitled as a matter of right to withdraw his plea of guilty before sentence. Such is not the law. There must be a valid reason other than a desire to put the government to its proof for the district court to be required to set aside a guilty plea. Cases in at least six

of the eleven circuits, including the District of Columbia Circuit, have so held, and there are no cases to the contrary. In most of these cases the defendant advanced more justification for setting aside the plea than did appellant here, and in none did he advance less, yet in all of them the district court's refusal to set aside the plea was affirmed.

ARGUMENT

The District Court properly denied appellant's motion to withdraw his plea of guilty.

The District Court properly denied appellant's Rule 32(d) motion to withdraw his plea of guilty on Count IV before sentence. The record of the April 25, 1963 hearing, at which he plead guilty, shows that appellant did so voluntarily and intelligently, and not in response to coercion or promises of leniency, after being apprised of his right to a jury trial and of the maximum sentence he could receive. He was on bail and discussed the situation freely with his lawyer and his family, prior to entering the guilty plea. (April 25 Tr. 13; June 27 Tr. 5). His lawyer was retained, not appointed. (June 27 Tr. 18-19). Appellant admitted in detail that he committed the crimes to which he was pleading guilty. The District Court took the utmost care in examining appellant in accordance with Rule 11, Fed. R. Cr. P., and the Resolution of the District Court Judges of June 24, 1959 (Appellant's Br., Appendix) before he accepted his guilty plea. Appellant concedes in this Court the "propriety and regularity" of the District Court's acceptance of the guilty plea (Br. 15).

In his written motion to withdraw his plea, at the hearing on the motion, and now on appeal, appellant has offered no reason why he should be permitted to withdraw his plea on Count IV before sentence other than his wish to stand trial on that count. He did not seriously deny his guilt on Count IV in his written motion, and he admitted his guilt at the hearing on the motion on June 27,

as he had when he plead guilty on April 25. It is clear from appellant's brief that his position is simply that a defendant who pleads guilty may withdraw his guilty plea before sentence as a matter of right. He states (Br. 18): "It would appear that the only burden that should be placed on the defendant under such circumstances would be to establish that he does in good faith desire to regain the right to stand trial on the charges against him." Such is not the law. The unexceptionable rule that motions to withdraw guilty pleas before sentence are to be "freely allowed" does not permit such withdrawal as a matter of right. There must be a reason that would make "fair and just" the granting of the "*privilege*" of withdrawing a guilty plea (Emphasis supplied). *Kerchevel* v. *United States*, 274 U.S. 220, 224 (1927); *Poole* v. *United States*, 102 U.S. App. D. C. 71, 75, 250 F.2d 396, 400 (1957). The mere wish to stand trial is not such a reason. The guilty plea, if voluntarily and intelligently entered by a defendant after he has been apprised of his right to a jury trial and the maximum possible sentence, is not a tentative expression of a defendant's position on his indictment which may be altered at will before sentence. It is the equivalent of a conviction, which will be freely set aside before sentencing only if there is some good reason for doing so other than the mere wish to stand trial. Absent such a reason—usually a showing of coercion or official promises of leniency—or the assertion of a reasonable defense, the District Court has wide discretion in dealing with a motion to withdraw a plea before sentence. These principles, which uphold the District Court's ruling in this case, have been established by a large number of courts of appeals cases which have affirmed denials by district courts of motions to withdraw guilty pleas *before sentence*. These cases are indistinguishable from the present case and control it. *High* v. *United States*, 110 U.S. App. D.C. 25, 288 F.2d 427 (1961), *cert. denied*, 366 U.S. 923; *Vasques* v. *United States*, 279 F.2d 34 (9th Cir. 1960); *United States* v. *Swaggerty*, 218 F.2d 875 (7th

Cir. 1955), *cert. denied*, 349 U.S. 959; *United States* v. *Guerini*, 296 F.2d 33 (4th Cir. 1961); *United States* v. *Moore*, 290 F.2d 501 (2d Cir. 1961), *cert. denied*, 368 U.S. 837; *United States* v. *Panebianco*, 208 F.2d 238 (2d Cir. 1953), *cert. denied*, 347 U.S. 913; *Goo* v. *United States*, 187 F.2d 62 (9th Cir. 1951), *cert. denied*, 341 U.S. 916; *Williams* v. *United States*, 192 F.2d 39 (5th Cir. 1951). None of the cases cited by appellant involves a situation comparable to the present one, or contradicts the cases cited above. Compare *Bergen* v. *United States*, 145 F.2d 181 (8th Cir. 1944); *Gearhart* v. *United States*, 106 U.S. App. D.C. 270, 272 F.2d 499 (1959).

Some additional observations in response to appellant's brief are appropriate. 1. Judge Schweinhaut obviously denied appellant's motion to withdraw his plea of guilty on Count IV because appellant offered no reason other than his wish to "have his day in court" to justify the motion. The judge clearly had the right and the duty to inquire, as he did, whether there was any other support for the motion. Since there was not, other than perhaps appellant's fear of the sentence (June 27 Tr. 2), he properly denied it. It is to be noted that Judge Schweinhaut permitted appellant to withdraw his plea of guilty as to Count III on appellant's mere assertion, which was contrary to his detailed confession in open court on April 25, that he was innocent of the robbery charged in Count III. This action by the court fully belies appellant's statement (Br. 14, 15) that "nothing in the record would even suggest that the court considered itself to be under a duty to freely allow" withdrawal of the guilty plea as to Count IV. 2. Since there was no basis for the withdrawal of the guilty plea on Count IV, appellant's counsel cannot be faulted for not persuading the judge that there was. Counsel properly informed the court that neither he nor appellant's family induced the plea against appellant's will. (April 25 Tr. 13; June 27 Tr. 5). *United States* v. *Swaggerty*, *supra*. The claim of ineffective assistance of counsel is frivolous. *Diggs* v. *Welch*, 80 U.S. App. D.C. 5, 8, 148 F.2d 667, 670 (1945). 3. The court properly

took into account appellant's detailed admission of guilt on Count IV on April 25, and his reiteration of it on June 27, in refusing to set aside the plea on Count IV. *High* v. *United States, supra; Vasquez* v. *United States, supra.* The cases cited by appellant (Br. 17) which demean guilt or innocence as a factor in the decision on a motion to withdraw a guilty plea all involve situations where (1) the defendant had some valid reason for seeking to withdraw the plea other than the desire merely to put the government to its proof, or (2) the district court's refusal to permit withdrawal of the guilty plea was *affirmed* on the ground, *inter alia*, that the question of guilt or innocence is irrelevant.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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